**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LAYTON LUPTON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,031,511 |
| **RUSTY ECK FORD** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **DEPOSITORS INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the December 4, 2006 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes.

## ISSUE

Did claimant suffer accidental injury arising out of and in the course of his employment with respondent? Claimant was awarded benefits by the Administrative Law Judge (ALJ) after the ALJ determined that claimant suffered accidental injury arising out of and in the course of his employment with respondent on October 12, 2006, when he was involved in an automobile accident while going to dinner with a co-worker in a company car. The ALJ determined that claimant's status as a passenger, rather than as the driver, was sufficient to allow claimant entitlement to workers compensation benefits.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be reversed. Claimant worked for respondent, a new and used car dealership, in sales. Claimant had worked for respondent for approximately six months when, on October 12, 2006, he was injured in a motor vehicle accident on his way to dinner with a co-worker in a company vehicle. On the date of accident, claimant had been too busy to eat lunch, and the deli on respondent's premises had closed at 5:00 p.m. At approximately 8:30 p.m., the work slowed down and claimant was able to take his dinner break.

Respondent's rule regarding dinner breaks allowed the employees to eat on the premises or leave the job and eat off-site. Occasionally, respondent would allow employees to use company vehicles for such trips, but only with the permission of the manager. In this instance, a co-worker asked claimant if he wanted to go to eat with him. Claimant agreed, and claimant left the premises in a company vehicle obtained by claimant's co-worker, Mike Bateman. Unknown to claimant, Mr. Bateman had failed to obtain the permission of the manager before taking the company vehicle. Mr. Bateman held no supervisory position over claimant. While on dinner break, claimant and Mr. Bateman were involved in an automobile accident. Claimant was knocked unconscious in the accident. Both claimant and Mr. Bateman were terminated the next day for using a company vehicle without permission. It is acknowledged that the trip had no official purpose, other than for claimant and his co-worker to obtain something to eat.

Respondent argues that claimant was involved in a prohibited activity at the time of the accident. The first question is whether claimant was involved in a prohibited activity in this instance or whether claimant was involved in an allowed activity, but the misconduct involved the method of accomplishing that activity.

> When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to the *method* of accomplishing that ultimate work, the act remains within the course of employment."[1]

Kansas law recognizes the distinction and has adopted the general rule that if an employee is performing work which has been forbidden, as distinguished from doing his or her work in a forbidden manner, the employee is not acting in the course of his or her employment.[2] Conversely, it is equally recognized that if work is performed in a forbidden manner, an employee is still acting in the course of his or her employment.[3] In this instance, claimant was involved in an appropriate activity (going to dinner) although in an inappropriate manner (unauthorized use of a company vehicle). If the analysis ended here, this matter would be compensable. However, it does not. This Board Member must next discuss the fact that claimant was at a dinner break, off respondent's premises.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[4]

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[1] 2 *Larson's Workers' Compensation Law*, Chapter 33 (2006).

[2] *Hoover v. Ehrsam Company*, 218 Kan. 662, ¶ 2, 544 P.2d 1366 (1976).

[3] *Servantez v. Shelton*, 32 Kan. App. 2d 305, 81 P.3d 1263, *rev. denied* 277 Kan. 925 (2004).

[4] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[8]

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which

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[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2006 Supp. 44-501(a).

[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[8] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

> is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[9]
>
> The rationale for the "going and coming" rule is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[10]

There is an exception to the "going and coming" rule when travel upon the public roadways is an integral or necessary part of the employment.[11]

In *Walker*,[12] the Kansas Supreme Court held that:

> . . . where the workman is on no mission or duty for the employer, and an accident occurs to the workman while he is off the premises of the employer during the workman's lunchtime, the accident does not arise out of and in the course of the workman's employment.

In this instance, there was no business purpose associated with claimant's leaving respondent's premises for dinner. It was clearly a personal errand, and the fact that claimant was in a vehicle owned by respondent does not change the nature of the trip. This Board Member finds that claimant's injuries suffered as the result of the automobile accident on October 12, 2006, while claimant and his co-worker were going to dinner, did not arise out of his employment with respondent. Therefore, the ALJ's decision to award benefits must be reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[9] K.S.A. 2006 Supp. 44-508(f).

[10] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[11] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[12] *Walker v. Tobin Construction Co.*, 193 Kan. 701, 705, 396 P.2d 301 (1964).

[13] K.S.A. 44-534a.

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated December 4, 2006, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

Dated this ____ day of February, 2007.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge